Essay

FRIVOLOUS LITIGATION AND CIVIL JUSTICE REFORM: MISCASTING THE PROBLEM, RECASTING THE SOLUTION

DEBORAH L. RHODE†

INTRODUCTION

When most Americans think about access to law, their primary impression is that the country has too much, not too little. Part of the reason for this perception is the media's delight in profiling loony litigation. America faces no shortage in supply of cases that seem too big for courts, cases that seem too small, and cases that should never have been cases at all. At one end of the spectrum are megasuits that ambled along for decades, wreaking financial havoc on all but the lawyers.[1] At the other end of the spectrum are trivial pursuits: football fans who sued referees,[2] prison inmates who wanted a legal right to chunky rather than smooth peanut butter,[3] mothers who asked a court to resolve a playground shoving match between their three-year-olds,[4] fathers prepared to litigate over their fifteen-year-olds' positions on high school athletic teams,[5] a purchaser of Cracker Jacks who

† B.A., J.D. Yale University; Ernest W. McFarland Professor of Law and Director of the Center on Ethics, Stanford University. This essay is based on a lecture given as the Seymour Siegel Memorial Lecture in Ethics at the Duke University School of Law in March 2004. An earlier version of the essay appears as Chapter 2 in DEBORAH L. RHODE, ACCESS TO JUSTICE 24–46 (2004).

1. *See* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 83–84 (2000) (outlining the litigation tactics meant to exhaust opponents' resources).

2. Jerold S. Auerbach, *A Plague of Lawyers*, HARPER'S, Oct. 1976, at 37, 42.

3. THOMAS BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS 2 (2002).

4. PHILIP K. HOWARD, THE LOST ART OF DRAWING THE LINE 14–15 (2001).

5. Dave McKibben, *Coaches' Lineup Could Include a Lawyer*, L.A. TIMES, May 5, 2003, at A1.

demanded damages for a missing prize,[6] and a McDonald's customer who sought $15,000 for damage to his teeth and marital relations caused by a defective bagel.[7]

Each year in teaching professional ethics, I focus a class session on litigiousness and begin with highlights from such cases. I describe the facts and results without linking them together. A prize goes to any student who correctly matches the claims and outcomes, which ranged from a six-figure jury verdict to sanctions for a frivolous claim. Almost no students come close. The following are representative examples of the disagreement among judges, jurors, and the public about what constitutes a frivolous lawsuit:

- A purchaser of the porn video "Belle of the Ball" sued the store in which he bought it on the ground that the featured actress graced the screen for only ten of seventy-five minutes. Alleged damages included the cost of medication to treat an asthma attack "brought on by the stress and strain of being 'ripped off.'"[8]
- A student who spent eleven fruitless years in search of the perfect state of life promised by Maharishi International University finally sued the school for fraud. Although the university had represented that the plaintiff would learn to fly, he had only learned to hop with legs folded in the lotus position. And contrary to the school's claims, chanting in the method prescribed did not reverse the aging process or enable him to self-levitate.[9]
- A restaurant customer, whose steak arrived well done, not "medium-well" as requested, voiced dissatisfaction not only about the meat but also about other aspects of the meal. When adequate remedies were not forthcoming, he called the police from his cell phone to get the situation corrected. The officer who arrived instead told the customer to pay up and get out, or face arrest. The lawsuit that followed sought damages from the restaurant owner, the police officer, the

6. HOWARD, *supra* note 4, at 15.

7. Chris Malcolm, *The Case Against a Bagel*, CHI. TRIB., Feb. 14, 2003, at 27; David Grimes, *Attack of the Killer Bagels*, SARASOTA HERALD-TRIB., Feb. 9, 2003, at E1.

8. Osborn v. Emporium Videos, 848 P.2d 237, 238 (Wyo. 1993). On remand, the trial court dismissed the case, and the state supreme court affirmed the dismissal. Osborn v. Emporium Videos, 870 P.2d 382 (Wyo. 1994).

9. *See* Kropinski v. World Plan Executive Council–U.S., 853 F.2d 948, 950–53 (D.C. Cir. 1988) (reversing a jury verdict and award of $137,890 and remanding for a new trial).

police department, the chief of police, the town, and the town board and its members.[10]

- A McDonald's drive-in customer wedged a chocolate milkshake between his legs as he headed back to the road. In reaching for french fries on the seat beside him, he inadvertently squeezed his legs. When the cold milkshake fell into his lap, the startled driver ploughed into the car in front of him. The driver of the other car subsequently sued McDonald's for failure to warn its customers of the risks of eating and driving.[11]
- A student who was fed up when stood up for the high school prom sued for the cost of her shoes, hairdo, flowers, and court filing fee.[12]
- A woman who dried a poodle in her microwave sought damages from the manufacturer for failure to warn her of the unhappy result.[13]

The existence of these cases, and the varying outcomes and reactions that they evoke, are emblematic of broader controversies about how much blaming and claiming belongs in the justice system.[14]

I. LEGAL HYPOCHONDRIA: ARGUMENT BY ANECDOTE

Americans are in widespread agreement that the nation has too much frivolous litigation but there is also broad disagreement about what falls into that category. About four-fifths of the public,[15] and

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10. *See* Schlessinger v. Salimes, 100 F.3d 519, 521 (7th Cir. 1996) (dismissing the claim and ordering sanctions against the plaintiff and his attorney for a frivolous appeal).

11. *See* JAMES L. PERCELAY, WHIPLASH! AMERICA'S MOST FRIVOLOUS LAWSUITS 54 (2000) (summarizing the court's decision to dismiss the suit but to deny McDonald's claim for attorneys' fees given the plaintiff's "creative and imaginative" claim).

12. *See Quotes*, A.B.A. J., Aug. 1989, at 30, 30 (reporting that the case was settled for $81.28, which covered the cost of shoes, hairdo, flowers and court filing fees).

13. *See* Roger C. Cramton, *What Do Lawyer Jokes Tell Us About Lawyers and Lawyering?*, CORNELL L.F., July 1996, at 3, 7 (indicating that the plaintiff recovered damages from the manufacturer for her unfortunate loss).

14. *See* RHODE, *supra* note 1, at 117–31 (describing public perception, media coverage, and debates surrounding civil litigation).

15. *See* Greg Pierce, *Inside Politics*, WASH. TIMES, Feb. 28, 2003, at A5 (citing a survey finding that 83 percent of Americans think that there are too many lawsuits); David G. Savage, *A Trial Lawyer on Ticket Has Corporate U.S. Seeing Red*, L.A. TIMES, Sep. 13, 2004, at A1 (citing a poll finding that 80 percent of Americans believe that the nation has too much litigation).

about four-fifths of surveyed jurors,[16] think that too many meritless cases are filed. But assessments of merit often differ widely, as is clear from the varying results in the cases described above. Another apt example is a Texas multiparty product liability case in which five juries reached substantially different verdicts after hearing the same facts.[17] Inconsistencies also show up in judicial determinations of which cases are sufficiently frivolous to warrant sanctions. One representative study asked nearly three hundred federal judges to consider one of ten hypothetical claims based on reported decisions.[18] In six of the cases, the judges divided almost evenly on whether to award sanctions.[19]

Complaints about frivolous litigation, and disputes about how to define and control it, are by no means a recent phenomenon. For over three centuries, Americans have fulminated against the bar as "cursed hungry Caterpillars"[20] and plagues of "locusts"[21] tormenting the nation with epidemics of unwarranted litigation and "sapping the vitality" from the free enterprise system.[22] The basis for this diagnosis is largely anecdotal. It draws heavily on what commentators label "news as vaudeville":[23] the aberrant, amusing "tort tales"[24] like those noted above.

Such cases receive disproportionate attention, and for obvious reasons. In an increasingly competitive media market, the line

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16. *See* Jeffrey Abramson, *The Jury and Popular Culture*, 50 DEPAUL L. REV. 497, 515 (2000) (discussing a 1996 report finding that more than 80 percent of jurors "believed that there were too many frivolous lawsuits").

17. ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 127 (2001).

18. SAUL M. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 11–15 (1985).

19. *Id.* at 17.

20. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 96 (2d ed. 1985).

21. Auerbach, *supra* note 2, at 37.

22. Terry Carter, *A Lesson Learned*, A.B.A. J., May 1998, at 70, 70 (quoting Thomas J. Donahue, President and CEO of the U.S. Chamber of Commerce); *see also* Archie W. Dunham, Speech at the National Press Club (Oct. 28, 2002) (critiquing the tort system for "drain[ing] billions of dollars from our productive capacity"), *available at* http://www.conocophillips.com/news/speeches/102802_npc.asp (on file with the *Duke Law Journal*).

23. Deborah L. Rhode, *A Bad Press on Bad Lawyers*, *in* SOCIAL SCIENCE, SOCIAL POLICY, AND THE LAW 139, 147 (Patricia Ewick et al. eds., 1999).

24. WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS 5–6 (2004). The text accompanying notes 24–40, *infra*, tracks the analysis in RHODE, *supra* note 1, at 120–21, and DEBORAH L. RHODE, ACCESS TO JUSTICE 26–27 (2004).

between news and entertainment increasingly blurs. Loony litigation plays to popular prejudice and offers a diverting alternative to dreary statistical details about the potential plaintiffs priced out of the justice process. As a result, the public gets anecdotal glimpses of atypical cases without a sense of their overall significance. A content analysis of one widely publicized book, *The Litigation Explosion*, tallied up its "evidence": 272 short anecdotes, 1 case study, and 6 citations to statistical surveys.[25] Many of the statistical data were highly misleading.[26]

The problem is compounded by political polemics and business-sponsored media campaigns that take considerable poetic license. In the 1992 presidential debates, then-President George H.W. Bush maintained that Americans were "suing each other too much and caring for each other too little."[27] His son continued the theme a decade later in calling for tort reforms to curb "junk lawsuits" and the "litigation culture."[28] Without apparent irony, a president who owed his election to a lawsuit has lamented, "We're a litigious society; everybody is suing, it seems like. There are too many lawsuits in America . . . ."[29] Their effect, according to President George W. Bush, is to "terrorize small business owners" and drive doctors out of practice.[30] And, he pointed out, "[N]o one has ever been healed by a frivolous lawsuit."[31]

Since 2001, the United States Chamber of Commerce alone has spent over $100 million on television commercials and related

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25. HALTOM & MCCANN, *supra* note 24, at 67 (discussing WALTER OLSEN, THE LITIGATION EXPLOSION (1992)).

26. *See infra* text accompanying notes 46–90.

27. BURKE, *supra* note 3, at 171 (quoting President George H.W. Bush).

28. Nick Anderson & Edwin Chen, *Bush Pushes Stance Against "Junk Lawsuits,"* L.A. TIMES, Oct. 22, 2004, at A20 (quoting President George W. Bush); *see* Stephen Labaton, *Bush's Calls for Tort Overhaul Face Action in Congress*, N.Y. TIMES, Feb. 3, 2005, at A12 (quoting President George W. Bush about the need "to protect honest job-creators from junk lawsuits"); Warren Vieth, *Bush Hammers Medical Malpractice Suits*, L.A. TIMES, Jan. 6, 2005, at A17 (quoting President George W. Bush's demand for national action against "junk lawsuits"); President George W. Bush, Address at the University of Scranton, Penn. (Jan. 16, 2003), *available at* 2003 WL 125455; *see also* Press Release, White House Office of the Press Secretary, President Calls for Medical Liability Reform, *at* http://www.whitehouse.gov/news/releases/2003/01/print20030116.html (Jan. 16, 2003) (on file with the *Duke Law Journal*) (summarizing President Bush's remarks).

29. Bush, *supra* note 28.

30. RHODE, *supra* note 1, at 121 (quoting George W. Bush, then-Texas governor).

31. David Hechler, *At ATLA, "We Are at War,"* NAT'L L.J., Feb. 10, 2003, at A1 (quoting President George W. Bush).

strategies.[32] The American Tort Reform Association (ATRA) coordinates public relations and lobbying efforts by over three hundred well-financed corporate and trade groups, along with thirty state reform organizations.[33] Advertising campaigns sponsored by business and insurance interests offer variations on the same theme. Some campaigns feature public parks and recreational facilities shut down because of liability concerns; other television ads show vaccines withdrawn from the market and pregnant women unable to find maternity care. A bumper sticker accompanying one campaign reads: "Go Ahead. Hit Me (I Need the Money)."[34] The demons in these morality plays are, of course, "fat cat" trial attorneys who are "living in the 'lap of luxury' at the expense of taxpayers and consumers."[35] The Manhattan Institute's report, *Trial Lawyers, Inc.*, and the associated website chronicle the costs of excessive claims.[36] Citizens against Lawsuit Abuse, which has local organizations in about a half dozen states, also has a website featuring "loony lawsuits" and strategies for curbing them.[37] Books sell widely with titles like *The Case against Lawyers*[38] and *The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law.*[39] Their message is simple: attorneys are "making out like bandits," while bankrupting businesses, clogging the courts, and pricing insurance out of reach for millions of consumers.[40]

The bar responds in kind. The Association of Trial Lawyers of America (ATLA) and its sister state organizations periodically launch major advertising efforts to educate voters and juries about the "true"

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32. Shailagh Murray, *Trial-Lawyers Lobby Discovers Unlikely Friends: Republicans*, WALL ST. J., July 8, 2004, at A1.

33. HALTOM & MCCANN, *supra* note 24, at 43.

34. Stephen Daniels & Joanne Martin, *"The Impact That It Has Had Is Between People's Ears:" Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DEPAUL L. REV. 453, 470 (2000).

35. Rhode, *supra* note 23, at 150.

36. The Manhattan Institute, Trial Lawyers Inc.com, *at* http://www.triallawyersinc.com.

37. HALTOM & MCCANN, *supra* note 24, at 45.

38. CATHERINE CRIER, THE CASE AGAINST LAWYERS (2002).

39. WALTER K. OLSON, THE RULE OF LAWYERS: HOW THE NEW LITIGATION ELITE THREATENS AMERICA'S RULE OF LAW (2003).

40. *See* CRIER, *supra* note 38, at 187 (noting the monetary costs and drain on judicial resources caused by "ridiculous suits"); *AAHP Launches New Television Ad Campaign*, PR NEWSWIRE, Jan. 25, 1999 ("Laws that make trial lawyers rich by drowning the courts with new lawsuits . . . could cost almost two million Americans their health insurance.").

villains and victims in personal injury litigation.[41] In the world that bar commercials portray, only attorneys stand between the ordinary citizen and the "corporate wolves" at the door: swindlers, polluters, and manufacturers of unsafe products.[42] Recent public relations efforts to halt malpractice reforms feature a disabled child in a wheelchair who will never walk again "because of a careless medical error."[43] In another advertisement, a woman recounts having both breasts removed after a false diagnosis of breast cancer.[44] "Who do you trust to say what's fair," an unseen narrator asks rhetorically, "the jury, or corporations and their politicians? Don't let them put profits over people."[45]

In these warring public relations campaigns, truth is a frequent casualty. The facts get dumbed down and spruced up to fit self-interested agendas. "Whatever you do has to fit on a bumper sticker," explains one veteran ATLA lobbyist.[46] Such sound bites distort the reality that they claim to describe. As one tort expert notes:

> Editorial writers, policy analysts, and legislators typically pick one of these competing [accounts], pair it with a few highly salient (and invariably unrepresentative) anecdotes, and then offer their preferred policy initiative as the solution du jour. . . .
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> . . . Those involved in this series of kabuki-like performances demonstrate little interest in determining which of these competing realities is true . . . .[47]

The result is that reform strategies are proceeding without an informed understanding of procedural pathologies, their underlying causes, and the complex tradeoffs that solutions will require.

The first difficulty is that critics' accounts of legal hypochondria prove neither that America has exceptional levels of frivolous claims

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41. *See* Martin Lasden, *On the Air*, CAL. LAW., June 2003, at 12, 12 (describing a recent ATLA advertising campaign).

42. *See* Rhode, *supra* note 23, at 151 (recalling one such ad by the Consumer Attorneys of California).

43. Lasden, *supra* note 41, at 12.

44. *Id*.

45. *Id*.

46. Murray, *supra* note 32, at A6 (quoting Linda Lipsen).

47. David A. Hyman, *Medical Malpractice and the Tort System: What Do We Know and What (If Anything) Should We Do About It?*, 80 TEX. L. REV. 1639, 1639–40 (2002).

nor that they occupy a substantial amount of judicial time.[48] Courts in many cultures provide outlets for petty grievances and develop strategies for sanctioning or summarily dismissing clearly meritless cases.[49]

Moreover, what qualifies as a frivolous claim generally depends on the eye of the beholder. Although some cases, including a number of those described earlier, meet almost anyone's definition, the line between vindictiveness and vindication is often difficult to draw. Sexual harassment lawsuits were once routinely dismissed as "petty slights of the hypersensitive," beneath judicial notice.[50] Yet only through these "petty" claims have Americans finally begun to recognize the real price of such abuse in turnover, absenteeism, psychological damages, unequal opportunities, and lost productivity.[51]

Many illustrations of trivial claims and outrageous verdicts also rely on misleading factual accounts. A textbook example involves a multimillion dollar punitive damages award against McDonald's for serving coffee at a scalding temperature.[52] To most Americans, this case served as an all-purpose indictment of the legal profession and legal process. An avaricious lawyer paraded a petty incident before an out-of-control jury and extracted an absurd recovery.[53] Politicians, pundits, and industry leaders replayed endless variations on the theme summarized by the national Chamber of Commerce: "Is it fair to get a couple of million dollars from a restaurant just because you spilled your hot coffee on yourself?"[54]

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48. The text accompanying notes 48–72 builds on earlier discussions in RHODE, *supra* note 1, at 121–23 and RHODE, *supra* note 24, at 28–29.

49. Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 56 (1983).

50. DEBORAH L. RHODE, SPEAKING OF SEX 98 (1997) (quoting trial judge's characterization).

51. KERRY SEGRAVE, THE SEXUAL HARASSMENT OF WOMEN IN THE WORKPLACE, 1600 TO 1993, 203 (1994).

52. Andrea Gerlin, *A Matter of Degree: How a Jury Decided That a Coffee Spill Is Worth $2.9 Million*, WALL ST. J., Sept. 1, l994, at A1. For my earlier account of the McDonald's case, see RHODE, *supra* note 24, at 28–29 and RHODE, *supra* note 1, at 122. For another, fuller treatment, see HALTOM & MCCANN, *supra* note 24, at 183–226.

53. *See* Gerlin, *supra* note 52 ("Public opinion is squarely on the side of McDonald's. Polls have shown a large majority of Americans . . . to be outraged at the verdict.").

54. RALPH NADER & WESLEY J. SMITH, NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA 267 (1996). The McDonald's case has figured prominently in Congressional debates. *See* HALTOM & MCCANN, *supra* note 24, at 279.

On closer examination, the question no longer looks rhetorical. The plaintiff, a 79-year-old woman, suffered acutely painful third-degree burns from 180-degree coffee.[55] She spent eight days in the hospital and returned again for skin grafts.[56] Only after McDonald's refused to reimburse her medical expenses did she bring suit.[57] At trial, jurors learned of seven hundred burn cases involving McDonald's coffee during the preceding decade.[58] Although medical experts had warned that such high temperatures were causing serious injuries, the corporation's safety consultant had viewed the number of complaints as "trivial."[59] The jury's verdict of $2.3 million was not an arbitrary choice.[60] Its punitive damages award represented two days of coffee sales revenues. The judge then reduced the judgment to $640,000.[61] To avoid an appeal, the plaintiff settled the case for a lesser, undisclosed amount.[62] McDonald's put up warning signs and other fast-food chains adopted similar measures.[63] Although evaluations of this final result may vary, it was not the patently "ridiculous" travesty that critics described.[64] The same is true of the approximately two dozen coffee spill cases that have gone to trial in the decade following the original verdict. Outcomes for plaintiffs have differed, but consumers as a group have benefited from tighter lids and other safety innovations.[65]

The skewed spin given to the McDonald's litigation is not an isolated case. Examples of litigiousness that are deficient in drama sometimes "have drama grafted on."[66] All too often, facts fall by the wayside to make a better story, and the public misses what the real

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55. NADER & SMITH, *supra* note 54, at 268–69.

56. *Id.* at 268.

57. *Id*.

58. *Id*. at 269.

59. *Id*.

60. *Id.* at 271.

61. *See id.* (noting the basis of the jury award); Cindy Webb, *Boiling Mad*, BUS. WK., Aug. 21, 1995, at 32, 32 (noting the reduction of the judgment).

62. NADER & SMITH, *supra* note 54, at 272.

63. Webb, *supra* note 61, at 32.

64. *See* NADER & SMITH, *supra* note 54, at 267 (quoting the U.S. Chamber of Commerce's characterization of the award as "ridiculous"). *But see* S. Reed Morgan, Letter to the Editor, *Verdict Against McDonald's Is Fully Justified*, NAT'L L.J., Oct. 24, 1994, at A20 (explaining the justification for the verdict).

65. Matt Fleischer-Black, *One Lump or Two*, AM. LAW., June 2004, at 15, 15.

66. *See* DAVID L. PALETZ & ROBERT M. ENTMAN, MEDIA, POWER, POLITICS 16 (1981) ("Drama is a defining characteristic of news.").

story should be. When unrepresentative anecdotes substitute for analysis, they camouflage broader trends.[67] Stories are easier to sell than statistics, so descriptions of what the ATRA terms "lawsuit abuse" are frequently long on folklore and short on facts.[68] The problem is compounded by cognitive biases. Because vivid incidents are consistently repeated and readily recalled, the public tends to overestimate how often they occur.[69] Drama displaces data, and Americans end up with a misdiagnosis of both the problem and the prescription.

A case in point is the perennially popular assertion that the United States is experiencing an escalating epidemic of litigation and has become "the world's most litigious nation."[70] Scholars have debunked this claim so often that it is startling how much bunk survives. Current litigation rates in the United States are not exceptionally high, in comparison either with prior eras or with many other Western industrial nations not known for contentiousness. Americans were more likely to sue a century ago than they are now.[71] United States court filings now are in the same range, when adjusted for population, as those in Canada, Australia, New Zealand, England, and Denmark.[72] According to Professor Marc Galanter's recent study,

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67. Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1161 (1992).

68. *See* KAGAN, *supra* note 17, at 135 (noting ATRA criticisms); *see also* HALTOM & MCCANN, *supra* note 24, at 1–13, 66–67 (describing distorted accounts); Lynn A. Baker & Charles Silver, *Civil Justice Fact and Fiction*, 80 TEX. L. REV. 1537, 1538–42 (2002) (documenting misconceptions and false anecdotes); Richard Lacayo, *Anecdotes Not Antidotes*, TIME, Apr. 10, 1995, at 40, 40 (critiquing a commentator's use of anecdotes); Jonathan Turley, *Legal Myths: Hardly the Whole Truth*, USA TODAY, Jan. 31, 2005, at 11A (citing fabricated accounts).

69. HALTOM & MCCANN, *supra* note 24, at 69, 153; Saks, *supra* note 67, at 1161.

70. John Leo, *The World's Most Litigious Nation*, U.S. NEWS & WORLD REP., May 22, 1995, at 24, 24; *see also* FRIEDMAN, *supra* note 20, at 16–17 (characterizing litigation as a "national disease"); Stephen Budiansky et al., *How Lawyers Abuse the Law*, U.S. NEWS & WORLD REP., Jan. 30, 1995, at 50, 50 (discussing a perceived "litigation explosion"). The discussion of litigation rates in the text accompanying notes 70–90 tracks RHODE, *supra* note 24, at 29–31 and RHODE, *supra* note 1, at 123–24.

71. Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1103 (1996); Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285, 285–86 (2002).

72. RHODE, *supra* note 1, at 123; Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943, 1981–82 (2002); *cf.* Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 80 (1993) (observing that the numbers of lawyers in England, Canada, and Germany increased at comparable or higher rates during the last generation).

"The Vanishing Trial," the number of federal and state courtroom contests peaked in the mid-1980s and has dramatically declined ever since.[73] It is true that Americans resort to litigation more often than other nations to solve social problems.[74] But whether or when this is undesirable is far more complicated than critics generally assume. The relevant question should be, "Compared to what?"

In any event, litigation rates are no measure of abusive litigation. Uncontested divorces account for much of the recent growth in civil caseloads. Yet the higher frequency of marital breakdowns appears less a reflection of increased litigiousness than of increased expectations for marital satisfaction and decreased tolerance of domestic violence.[75] Nor do such cases constitute a major drain on judicial resources: one representative survey clocked the average uncontested divorce hearing at four minutes.[76] Although business leaders are the sharpest critics of litigiousness, disputes between businesses are the largest and fastest growing category of civil cases. Tort claims, such as those involving personal injuries and defective products, trigger the most criticism but are in fact declining.[77] Improvements in product safety, increased use of alternative dispute resolution, and tort reforms that make lawsuits less profitable have all played a role in curbing litigation.[78]

What are rising, however, are the size of tort awards and malpractice premiums, and these increases prompt substantial concern. For example, in product liability litigation, the median award, not including punitive damages, has tripled over the last

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73. *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEG. STUD. 459 (2004) (tracing the decline in the portion of cases that terminate in trials); Tyler Cunningham, *Disappearing Act*, S.F. DAILY J., June 1, 2004, at A1 ("Although the number of lawsuits filed has generally increased over [the past four decades], fewer of them end in the courtroom drama commonly thought to be law's main event.").

74. BURKE, *supra* note 3, at 4; *cf.* MICHAEL H. TROTTER, PROFIT AND THE PRACTICE OF LAW 167 (1997) (noting the rapid increase in rates of case filings in the United States since the early 1980s).

75. RHODE, *supra* note 1, at 123.

76. Ralph C. Cavanagh & Deborah L. Rhode, *The Unauthorized Practice of Law and Pro Se Divorce*, 86 YALE L.J. 104, 129 (1976).

77. Greg Winter, *Jury Awards Soar As Lawsuits Decline on Defective Goods*, N.Y. TIMES, Jan. 30, 2001, at A1.

78. Ted Rohrlich, *We Aren't Seeing You in Court*, L.A. TIMES, Feb. 1, 2001, at A1; *see also* Galanter, *supra* note 72, at 92–95 (noting the decrease in products liability suits filed).

decade.[79] Medical malpractice recoveries have grown as well, although at more modest rates.[80] Malpractice premiums in some regions and some specialties also have risen dramatically; in 2002 alone, some doctors paid increases between 40 and 112 percent.[81] It is, however, unlikely that the average increases result from abusive litigation or runaway jury verdicts. Indeed, the most commonly cited reasons for the growing size of awards are that medical costs have increased at about the same rate as recoveries and that plaintiffs' lawyers are more selective in the litigation that they bring; only cases with reasonably strong evidence of liability and substantial damages are worth litigating.[82] Punitive damages, the most common target of critics, are awarded in only about 4 percent of cases that plaintiffs win in court,[83] and only about 2 percent of malpractice claims result in victories at trial.[84] Contrary to common wisdom, juries are no more likely than judges to show sympathy for injured victims and to award punitive damages.[85]

So, too, the average increase in malpractice premiums is not exceptional in relation to health care costs and reflects a number of factors that bear no relation to the merits of suits filed. First, the average increase in doctors' premiums over the last quarter century has been between 11 and 12 percent, which is about the same as recent increases in health insurance premiums for individual consumers and their employers.[86] Moreover, according to most commentators, the spikes in costs for physicians in some areas are

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79. Winter, *supra* note 77. *But see* Jonathan D. Glater, *Study of Size of Jury Awards Finds a Flattening Trend*, N.Y. TIMES, Feb. 19, 2005, at C2 (noting that both the total and the median of the largest jury awards have declined from 2002 to 2004).

80. Peter Eisler et al., *Hype Outraces Facts in Malpractice Debate*, USA TODAY, Mar. 5, 2003, at 1A. Not all regions show substantial growth. *See* Bernard Black et al., *False Diagnosis*, N.Y. TIMES, Mar. 10, 2005, at A25 (citing findings that large Texas malpractice awards between 1988 and 2002, when adjusted for inflation, showed no significant increase).

81. Press Release, White House Office of the Press Secretary, *supra* note 28.

82. *See* Eisler et al., *supra* note 80 ("Medical costs are going up . . . and they tend to drive up medical malpractice awards . . . ."); Joseph B. Treaster, *Malpractice Insurance: No Clear or Easy Answers*, N.Y. TIMES, Mar. 5, 2003, at C1 (noting lawyers' reluctance to take weak cases with low award potential); Winter, *supra* note 77 ("Smaller cases are getting priced out of the market . . . .").

83. William Glaberson, *A Study's Verdict: Jury Awards Are Not Out of Control*, N.Y. TIMES, Aug. 6, 2001, at A9.

84. Eisler et al., *supra* note 80.

85. Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 779 (2002).

86. Eisler et al., *supra* note 80.

largely attributable to factors other than litigation: poor investment revenues for insurance companies; the loss of a few major providers; and the need to compensate for price wars in the 1990s, when greater competition kept premiums low.[87] How much effect large damage awards have on policy costs is subject to debate,[88] but most evidence suggests that caps on awards are not the best way of controlling malpractice policy costs.[89] States such as California that have curtailed such costs have done so by regulating the insurance industry, not by limiting lawsuit recoveries.[90] That is not to deny the hardships resulting from premium increases, nor to discount other problems in the tort system. But it is to suggest that the nature and causes of those problems are rather different from what conventional wisdom assumes.

II. REDEFINING THE PROBLEM: INEFFICIENCY, INCONSISTENCY, AND INEQUITY

Although excessive litigation is the pathology dominating public discussion and policy agendas, systematic research reveals that the more serious problems are undercompensation of victims and overcompensation of lawyers. For example, the most systematic research finds that only about 10 percent of accident victims file

87. Richard A. Oppel, Jr., *Bush Enters Fray over Malpractice*, N.Y. TIMES, Jan. 17, 2003, at A1; *see also* Black et al., *supra* note 80 (citing evidence that the increase in Texas malpractice premiums reflects forces outside the tort system); Laura Bradford, *Out of Medicine*, TIME, Sept. 16, 2002, at A13, A13 (attributing the rising costs of malpractice insurance to the fact that some insurers raised premiums to compensate for decreased investment and others "pulled out of the malpractice market completely"); Eisler et al., *supra* note 80 (suggesting that insurance companies raised medical malpractice premiums to compensate for the price wars of the 1990s); Jyoti Thottam, *He Sets Your Doctor's Bill*, TIME, June 9, 2003, at 50, 50 ("Industry analysts say insurers' investment losses, not just jury awards, are behind the crisis [in medical malpractice insurance costs].").

88. For discussion of the relationship between caps and premiums, see Kenneth E. Thorpe, *The Medical Malpractice "Crisis": Recent Trends and the Impact of State Tort Reforms*, HEALTH TRACKING, Jan. 21, 2004, at W4-20, W4-25 to W4-27; Eisler et al., *supra*, note 80; Richard Perez-Pena, *Few Doctors at Protests on Insurance in New York*, N.Y. TIMES, May 21, 2003, at B5; Treaster, *supra* note 82.

89. Eisler et al., *supra* note 80. Moreover, it is also unclear that caps on noneconomic damages effectively limit the defendants overall liability. Adam Liptak, *Go Ahead. Test a Lawyer's Ingenuity. Try to Limit Damages*, N.Y. TIMES, Mar. 6, 2005, at E5 (discussing a study of jury verdicts finding that the amounts were roughly comparable in states with and without caps).

90. *See* Treaster, *supra* note 82 (observing that California's price controls, adopted in 1988, had the greatest and most consistent effect on lowering malpractice insurance premiums).

claims and only 2 percent bring lawsuits.[91] Similarly, a review of some thirty thousand New York hospital records discloses that only about 12 percent of patients who sustained injuries from negligent medical care brought malpractice actions and only half of those patients received compensation.[92] Other research on medical malpractice cases finds that plaintiffs on average recover just over half of their costs, and those claimants with the most severe injuries end up with only a fourth of their costs.[93] Similar patterns of undercompensation hold for victims of unsafe products or automobile and airline accidents.[94] The tort liability system reimburses only about 4 percent of victims' direct losses from accidental injuries.[95]

Part of the reason for this undercompensation lies in the highly expensive adversarial system on which Americans rely to compensate most injuries. This nation turns to courts for needs that other countries meet through less costly administrative measures and social services.[96] For example, accident victims in many Western industrialized societies can seek assistance from agency-run compensation structures, guaranteed health insurance, or no-fault wage replacement systems, rather than from personal injury litigation. Litigation American style is too expensive for claims involving modest economic damages and medical costs. Recent tort reforms capping pain and suffering awards have made lawsuits even less feasible for the vast majority of injuries.[97] Cases worth less than $150,000 are typically priced out of the court system.[98]

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91. DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 121–26 (1991); *see also* PETER A. BELL & JEFFREY O'CONNELL, ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW 58 (1997) (referring to Hensler's finding, *supra*, that "a very small percentage of injured persons—in the neighborhood of 10 percent—make any kind of claim for compensation from an injuring party or his insurer"); Marc Galanter, *The Conniving Claimant: Changing Images of Misuse of Legal Remedies*, 50 DEPAUL L. REV. 647, 663 (2000) (noting a study finding that 10 percent of potential claimants made claims); Saks, *supra* note 67, at 1183–87 (reviewing results of various studies of tort claimants' behavior).

92. HARVARD MED. PRACTICE STUDY, PATIENTS, DOCTORS AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION AND PATIENT COMPENSATION IN NEW YORK 2, 6 (1990).

93. Frank A. Sloan & Stephen S. van Wert, *Cost and Compensation of Injuries in Medical Malpractice*, 54 LAW & CONTEMP. PROBS. 131, 155 (Winter 1991).

94. HENSLER ET AL., *supra* note 91, at 121–28; HALTOM & MCCANN, *supra* note 24, at 98.

95. KAGAN, *supra* note 17, at 140; HENSLER ET AL., *supra* note 91, at 121–28.

96. *See* BURKE, *supra* note 3, at 3–4 (discussing "America's uniquely litigious public policy style"); KAGAN, *supra* note 17, at 135–37 (discussing the Japanese system, which focuses on nonlitigious dispute resolution).

97. *See* Jamie Court, Commentary, *Damage Cap Adds Insult to Injuries*, L.A. TIMES, Feb. 10, 2003, at B11 ("[I]nnocent patients who cannot prove large wage loss or medical bills . . .

The expense of legal proceedings is not, of course, lost on the public. Over four-fifths of surveyed Americans believe that litigation is too slow and too costly, and about three-quarters believe that it is damaging the country's economy.[99] About half of surveyed corporate leaders think that product liability suits have a major impact on their companies' international competitiveness.[100] Yet, although concerns about expense are eminently justifiable, fears about economic productivity are less well grounded. Precise cost assessments are lacking, but the most systematic research estimates that tort liability could represent no more than 2 percent of the total expense of United States goods and services, an amount highly unlikely to have a substantial effect on American competitiveness.[101] Other estimates suggest that businesses' total liability for all legal claims, including torts, is about twenty-five cents for every one hundred dollars in revenue.[102] Given such modest costs, it is not surprising that corporate risk managers have reported relatively little adverse effect from liability on larger economic indicators such as gross revenues or market share. In managers' experience, the major impact of tort claims has been to improve product safety and warning efforts.[103]

A related concern about the expense of litigation is that undue risks of liability and excessive insurance premiums cause businesses to refrain from distributing valuable products and force doctors to shift their practice locations, change their specialties,[104] or order

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often cannot find attorneys because the economics do not add up for lawyers . . . ."); *infra* text accompanying note 183.

98. Court, *supra* note 97.

99. *See* Karen O'Connor, *Civil Justice Reform and Prospects for Change*, 59 BROOK. L. REV. 917, 922 (1993) (noting the results of a study on attitudes toward the speed and cost of litigation); Randall Samborn, *Anti-Lawyer Attitude Up*, NAT'L L.J., Aug. 9, 1993, at 1 (noting poll results on the effect of litigation on the national economy).

100. *See* KAGAN, *supra* note 17, at 147.

101. Robert E. Litan, *The Liability Explosion and American Trade Performance: Myths and Realities*, *in* TORT LAW AND THE PUBLIC INTEREST 127, 128–29 (Peter H. Schuck ed., 1991).

102. NADER & SMITH, *supra* note 54, at 279.

103. NATHAN WEBER, PRODUCT LIABILITY: THE CORPORATE RESPONSE 2 (Conf. Bd., Rep. No. 893, 1987).

104. For reports that excessive premiums are driving doctors in some states out of business, causing them to abandon high-risk specialty procedures or forcing them to move states with more favorable tort laws, see Daniel Eisenberg & Maggie Sieger, *The Doctor Won't See You Now*, TIME, June 9, 2003, at 46, 46; Eisler et al., *supra* note 80; *Ten-Gallon Tort Reform*, WALL ST. J., June 6, 2003, at A10.

unnecessary medical tests.[105] Critics claim that Americans are guided less by the rule of law than by "the fear of law."[106] Here again, some concern is warranted but the extent of the problem often is overstated. The exodus of doctors appears confined to a few geographic areas and a few fields such as obstetrics.[107] On average, only about 3 percent of doctors' revenue covers malpractice premiums,[108] an amount not self-evidently excessive or likely to cause major career changes. Most research has not found a systematic relationship between insurance premium increases and withdrawals from practice.[109] Studies of "defensive medicine" suggest that liability risks have led to both desirable *and* excessive precautions.[110] Whether the costs are justified involves complex value tradeoffs that popular debate generally ignores or obscures. A review by the federal government's Office of Technology Assessment concludes that "a relatively small proportion of all diagnostic procedures—certainly less than 8 percent overall—is performed primarily due to conscious concern about malpractice liability risk."[111] Many experts also believe that the frequency of unnecessary procedures has been declining still further as a result of cost constraints imposed by managed care.[112] Although product withdrawals sometimes have been a major problem, as in the case of vaccines for childhood illnesses,[113] in other instances litigation has reduced major safety risks. Obvious examples

105. *See* HOWARD, *supra* note 4, at 25 ("'We know we don't need [X rays],' one doctor admitted, 'but you have to prove it in court.'" (alteration in original)).

106. Mortimer B. Zuckerman, *Welcome to Sue City, U.S.A.*, U.S. NEWS & WORLD REP., June 16, 2003, at 64, 64.

107. *See* Eisler et al., *supra* note 80 ("[D]octors in particularly vulnerable specialties—obstetrics, neurosurgery and some high-risk surgical fields—face severe problems . . . .").

108. *Id*.

109. *See* OFFICE OF TECH. ASSESSMENT, U.S. CONG., DEFENSIVE MEDICINE AND MEDICAL MALPRACTICE 74 (1994) (observing that two studies found no "statistically significant positive relationship between liability risk and withdrawal from obstetrics practice"); Eisler et al., *supra* note 80 ("[T]here is little statistical evidence that more than a tiny percentage of doctors nationwide are making such decisions [to leave practice because of rising premiums].").

110. KAGAN, *supra* note 17, at 274 n.28; *see also* BELL & O'CONNELL, *supra* note 91, at 92 (noting both beneficial and "wasteful" effects of defensive medicine); Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 402 (1994) ("[T]he practice changes induced by the malpractice system include a substantial measure of both [appropriate and inappropriate defensive medicine].").

111. OFFICE OF TECH. ASSESSMENT, *supra* note 109, at 74.

112. Michelle M. Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 TEX. L. REV. 1595, 1607 (2002).

113. *See* KAGAN, *supra* note 17, at 143 (noting the withdrawal of some childhood vaccine manufacturers from the market).

include asbestos, flammable pajamas, Dalkon Shields, and products causing toxic shock syndrome.[114]

Exaggerated portraits of litigation expenses also compound the problem that critics describe. Systematic overestimation of liability costs encourages unnecessary tests and product removals.[115] And media coverage that disproportionately focuses on huge damages awards encourages such skewed perceptions.[116] Cases reported by the press have verdicts between four and thirty-four times larger than the average.[117] Many of these large verdicts are reversed or settled for lesser amounts. One study of malpractice cases found that almost half were reduced after the verdict.[118] Other research on punitive damages has found that three-fifths of the jury awards are not fully paid.[119] Yet because the news needs to be new, exceptional awards attract disproportionate coverage. Such awards are easier for reporters to identify, because plaintiffs' lawyers have an obvious interest in publicizing large victories rather than humiliating losses or modest settlements. Confidentiality agreements also prevent disclosure of many final outcomes.[120] Moreover, cases involving exceptional recoveries or frivolous claims often are especially memorable.[121] The combined effect of selective reporting and selective recall leads to misperceptions of the likelihood of large recoveries, particularly in tort contexts.[122] Even relatively well-informed individuals—including

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114. NADER & SMITH, *supra* note 54, at 315–17 (listing cases in which tort liability led to significant safety improvements, including in tampons and flammable pajamas); Schwartz, *supra* note 110, at 406 (discussing the Dalkon Shield).

115. *See, e.g.*, KAGAN, *supra* note 17, at 142–43 (citing examples of unnecessary deterrence).

116. Marc Galanter, *The Regulatory Function of the Civil Jury*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 61, 85 (Robert E. Litan ed., 1993).

117. Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUM. BEHAV. 419, 426 (1996); *see also* HALTOM & MCCANN, *supra* note 24, at 166, 167 tbl.4 ("[M]ore than nine out of ten reported settlements and about seven out of ten reported awards surpass [the estimated medians of settlement and award amounts].").

118. Joseph T. Hallinan, *In Malpractice Trials, Juries Rarely Have the Last Word*, WALL ST. J., Nov. 30, 2004, at A1 (referring to a study by Professor Neil Vidmar).

119. HALTOM & MCCANN, *supra* note 24, at 99.

120. *Id.* at 129–31.

121. *See* William Glaberson, *The $2.9 Million Cup of Coffee: When the Verdict Is Just a Fantasy*, N.Y. TIMES, June 6, 1999, at D1 ("Unusual or big verdicts make news . . . .").

122. For discussion of the psychological tendency of individuals to overestimate the frequency of a given type of occurrence based on their recall of examples of that occurrence, regardless of its actual statistical likelihood, see Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207, 208 (1973); *see also* HALTOM & MCCANN, *supra* note 24, at 153 ("Newspapers report the

lawyers, legislators, and insurance adjusters—have highly inflated perceptions of both the frequency of litigation and the size and likelihood of plaintiffs' verdicts.[123]

Research on the litigation system reveals significant problems but they are not the ones highlighted in popular debate and policy agendas. The most well-documented concerns involve inefficiency and inconsistency.[124] Litigation is an extremely expensive way to compensate victims. Plaintiffs' attorneys collect an estimated $30 billion annually in legal fees[125]—money that could otherwise help prevent or compensate injuries. In cases of automobile accidents, almost 50 percent of the payments by insurance companies end up in the hands of lawyers for both sides rather than in the pockets of victims.[126] In other tort cases, the transaction costs are even higher, averaging close to 60 percent.[127] And in mass tort litigation involving asbestos, two-thirds of insurance expenditures have gone to lawyers and experts.[128] Such costs are not inevitable. Other countries do better by relying more heavily on official investigations and nonlitigious dispute resolution procedures to resolve accident claims.[129] In Japan, for example, experts estimate that legal fees consume only about 2 percent of compensation payments.[130] Few victims find it necessary even to hire lawyers.[131] The Netherlands' no-fault system for

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spinning of tort reformers and, having thereby made tort tales widely available, cite that very availability as evidence of frequency.").

123. Galanter, *supra* note 116, at 85–86; *see also* Donald R. Songer, *Tort Reform in South Carolina: The Effect of Empirical Research on Elite Perceptions Concerning Jury Verdicts*, 39 S.C. L. REV. 585, 594–98 (1988) (describing a study finding that doctors, lawyers, and legislators significantly overestimated trends in civil litigation and jury awards); Glaberson, *supra* note 121 (describing policymakers' reliance on exaggerated impressions of the tort system).

124. *See* KAGAN, *supra* note 17, at 126–27 (commenting on the inefficiency and inconsistency of American asbestos litigation).

125. Pamela Sherrid, *Lawyers on Trial*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 34, 34.

126. *See* DEBORAH R. HENSLER ET AL., TRENDS IN TORT LITIGATION 29 (1987) (finding that plaintiffs in automobile-related cases received 52 percent of total payouts); *see also* Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2099–100 (2002) (discussing the Hensler study's findings, *supra*).

127. *See* HENSLER ET AL., *supra* note 126, at 29 (finding that plaintiffs in non-automobile-related cases received 43 percent of total payouts).

128. *See id.* (finding that plaintiffs in asbestos-related cases received 37 percent of total payouts).

129. *See* KAGAN, *supra* note 17, at 136–37 (describing Japanese procedures).

130. *Id.* at 137; Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 LAW & SOC. REV. 651, 663–64 (1990).

131. *See* KAGAN, *supra* note 17, at 137 (citing data showing that fewer than 2 percent of Japanese accident victims hire lawyers).

reimbursing asbestos victims similarly manages to avoid the excessive transaction costs of American litigation.[132] These systems may, of course, create other problems of undercompensation.[133] But as noted above, undercompensation is also common in the American justice system, which prices out modest claims entirely and imposes excessive transaction costs on the ones that remain.[134]

The problems are compounded in class action cases in which the real parties in interest are the lawyers. In some cases, class members' injuries are *de minimis*, but the costs of trial are sufficient to lead to settlements that provide generous counsel fees for plaintiffs' attorneys and little or no compensation for clients.[135] Defendants find such settlements particularly inviting if the remedy can be structured so that most plaintiffs will not claim the damages to which they are theoretically entitled. The most notorious example is the coupon settlement, in which prevailing parties receive a discount against future purchases of the defendants' products.[136] Often, the amounts are too trivial to justify efforts to collect them. In one all too typical case, only two of 96,754 coupons were ever redeemed, a rate of .002 percent.[137] In other cases involving big-ticket items like cars or trucks, few plaintiffs are likely to make another purchase within the redemption period.[138] Because attorneys' fees for prevailing parties are generally based on the damages officially awarded, not those actually redeemed, lawyers may be well compensated by coupon settlements that are little more than sales promotions for defendants' products.[139]

Such strategies received the treatment that they deserved in columnist Dave Barry's account of the "Adhesive Denture

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132. *See id.* at 126–27 (comparing the relative costs of the Dutch and American systems).

133. *See id.* at 126 (describing compensation under the Dutch system as "modest").

134. *See* BURKE, *supra* note 3, at 194 (discussing transaction costs); KAGAN, *supra* note 17, at 126–27 (discussing undercompensation in the asbestos context); *supra* text accompanying note 98.

135. *See* CRIER, *supra* note 38, at 194 (observing that, in a settlement of a suit against Blockbuster Video, "[c]lass members [got] a free rental, but the attorneys rake[d] in a bundle").

136. *See* Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439, 473 (1996) (describing coupon settlement procedures).

137. CRIER, *supra* note 38, at 194.

138. Wolfman & Morrison, *supra* note 136, at 502.

139. *See* NADER & SMITH, *supra* note 54, at 195 (quoting the Court of Appeals for the Third Circuit's rejection of the GM coupon settlement as "arguably . . . a GM sales promotion device").

Menace."[140] This national peril arose after a manufacturer recalled certain adhesives containing traces of benzene, a potential carcinogen.[141] Without evidence of any actual injuries, vigilant attorneys brought suit on behalf of purchasers unaware of their "victimhood."[142] The settlement gave several hundred known buyers seven dollars and gave some 2,800 undocumented buyers the opportunity to fill out forms and receive a package of discount coupons.[143] Lawyers' fees and expenses totaled almost $1 million.[144] As Barry acknowledges, this may seem like "[a] lot of money . . . [but i]t cannot be easy, taking a case wherein it appears, to the naked untrained layperson eye, that nobody has suffered any observable harm, and, using legal skills, turning it into a financial transaction that involves thousands of people and a million dollars! Plus coupons!"[145]

However, the value of these cases cannot be measured solely in economic terms. Their function is also deterrence. Class actions serve to discourage misconduct when none of the injured parties suffers large enough individual damages to justify legal challenge. Generous awards in successful cases also help compensate attorneys for cases that are unsuccessful. The same is true of tort litigation more generally. Some plaintiffs' lawyers incur large risks in subsidizing lawsuits that serve crucial public interests.[146] Often, an entrepreneurial plaintiffs' bar has ensured accountability for hazardous products, fraudulent practices, discriminatory conduct, and other violations of legal rights. Litigation has stepped in where politicians and government regulators have feared to tread, and Americans have a safer and more just society as a consequence. Moreover, many plaintiffs' attorneys do not earn excessive returns for bringing such actions. Outside the large metropolitan areas where high-stakes litigation centers, the average earnings of contingent fee attorneys

140. Dave Barry, *Lawyers Put the Bite on Denture-Adhesive Maker*, ORLANDO SENTINEL, Nov. 23, 1993, at E1.

141. *Id*.

142. *Id*.

143. *Id*.

144. *Id.*

145. *Id*.

146. The most obvious recent example is the tobacco cases. *See* HALTOM & MCCANN, *supra* note 24, at 258–59. For discussion of excessive claims by tobacco lawyers, see Alex Beam, *Greed on Trial*, ATLANTIC MONTHLY, June 2004, at 96.

may not be significantly greater than those of counsel who bill hourly.[147]

Yet, although the problem of excessive fees is frequently overstated, it clearly needs addressing. In too many cases, windfall recoveries for lawyers far exceed reasonable returns, or the incentives necessary to bring socially useful lawsuits.[148] The cost of such excessive fees does not fall only on businesses with deep pockets. The result may be an increase in prices for consumers or a reduction in the funds available for compensating seriously injured plaintiffs. The *American Lawyer* magazine had it right in a story about one class action attorney who represented some eighty thousand clients with the same basic claims for leaky plumbing.[149] Despite the relatively minimal work required, he sought over $100 million in fees and expenses, totaling about two-thirds of the class settlement fund.[150] The story's headline came to the point: "Greedy, Greedy, Greedy."[151]

Not only is the American adversary system excessively expensive, it is also inaccurate and inconsistent.[152] The most systematic studies of medical malpractice cases have found that most victims of substandard care did not file claims or recover any compensation, but that more than 80 percent of those who did bring suit did not receive deficient care.[153] Almost half of these medical

147. *See* Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 302 (1998) (summarizing study results indicating that contingency-fee practice produces "at best 'somewhat' better" returns for lawyers, especially in light of the time and effort required to screen cases and the inability of most contingency-fee lawyers to "tap into" high-profit cases routinely). *But see* Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L.Q. 653, 686, 734 (2003) (arguing that contingent-fee lawyers have far higher effective hourly rates in tort litigation); Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65, 69 (2003) ("[A] top tier consisting of approximately 25 to 30 percent of the torts bar is able to obtain effective rates of return of thousand of dollars an hour; when these fees are obtained in cases where the lawyer has undertaken no meaningful risk, they are properly referred to as windfall fees.").

148. LESTER BRICKMAN ET AL., RETHINKING CONTINGENT FEES 20–23 (1994); Brickman, *The Market for Contingent-Fee Financed Tort Litigation*, *supra* note 147; *see* Beam, *supra* note 146, at 96–98, 105–108.

149. Alison Frankel, *Greedy, Greedy, Greedy*, AM. LAW., Nov. 1996, at 71, 71.

150. *Id.* at 72.

151. *Id*. at 71.

152. *See* Joseph Sanders, *Adversarial Legalism and Civil Litigation: Prospects for Change*, 28 LAW & SOC. INQUIRY 719 (2003) (reviewing KAGAN, *supra* note 17) (outlining the "costliness" and "legal uncertainty" of the American system of "adversarial legalism").

153. KAGAN, *supra* note 17, at 140; Peter Huber, *Easy Lawsuits Make Bad Medicine*, FORBES, Apr. 21, 1997, at 166, 166.

malpractice plaintiffs nonetheless recovered damages because the expenses of trial and risks of a large verdict made modest settlements an attractive alternative for insurers.[154] Other research on personal injury claims reveals high levels of fraud, which is estimated to cost insurance companies between $80 billion and $120 billion annually.[155]

In the tort cases that go to trial, results are often idiosyncratic and poorly related to the extent of plaintiffs' injuries and defendants' culpability.[156] What matters more is which side has the most effective lawyers, whether the case is filed in a "plaintiff-friendly" region,[157] and whether defendants appear to have deep pockets.[158] For example, in one study of two decades of Chicago jury awards, plaintiffs who fell in buildings owned by corporations recovered significantly higher damages than plaintiffs who fell on government property, and three times as much as plaintiffs who fell in private residences.[159] In mass tort cases, much depends on when the party's injury is discovered and how quickly the claim proceeds. Many asbestos victims with serious injuries will recover less than victims with minor claims because, by the time those injuries develop, most defendants will be bankrupt and their assets largely exhausted.[160] Other factors also contribute to the

154. *See* KAGAN, *supra* note 17, at 140 (observing that expense and uncertainty in litigation often pressure insurers to settle); Mello & Brennan, *supra* note 112, at 1619 (noting that sixteen of thirty-seven surveyed claims were paid even though none of the claims was found to have involved negligence).

155. *See* KAGAN, *supra* note 17, at 146 (citing studies of high fraud rates); Silver, *supra* note 126, at 2076 (citing figures of insurance loss from fraud).

156. *See* BURKE, *supra* note 3; KAGAN, *supra* note 17, at 138–42; Daphne Eviatar, *Is Litigation a Blight, or Built In?*, N.Y. TIMES, Nov. 23, 2002, at B7 (paraphrasing Professor Thomas F. Burke's view that "the system is far from equitable or predictable").

157. *See* OLSON, *supra* note 39, at 209–36 (using various examples to describe the Deep South as the "Jackpot Belt"); Jim Copland, *The Tort Tax*, WALL ST. J., June 11, 2003, at A16 (discussing the phenomenon of "magnet courts" or "magic jurisdictions" for class action suits); Adam Liptak, *Playing the Angles in Class-Action Lawsuits*, N.Y. TIMES, Nov. 17, 2002, at C11 (reporting on a class action suit against Intel filed in Madison County, Illinois, the county with the most class action filings per capita nationwide); *Ten-Gallon Tort Reform*, *supra* note 104 (praising tort reform legislation in Texas and noting that the state had previously been described as a "judicial hellhole[] . . . correctly perceived as [a] very plaintiff-friendly jurisdiction[]").

158. *See* Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2105 (1998) ("[E]quivalent outrage and punitive intent will produce significantly higher dollar awards against wealthy defendants.").

159. KAGAN, *supra* note 17, at 140.

160. *See* Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After* Anchem *and* Ortiz, 80 TEX. L. REV. 1899, 1924 (2002) ("[T]he very sickest must give up some of the compensation that might otherwise be theirs in order to satisfy the least sick (and their lawyers). Moreover, those who discover that they are seriously injured some years hence may find very little money left on the table."); Adam Liptak, *Shot in the Arm for Tort Overhaul*, N.Y. TIMES,

inconsistency in treatment of similar cases, such as the vagueness of criteria for determining pain and suffering awards and punitive damages, and jurors' lack of information or experience concerning the recoveries for similar claims in other cases.[161] Many studies find a poor correlation between juries' and experts' evaluations of the same claims. Although, as noted earlier, most serious injuries are undercompensated, a few plaintiffs hit the jackpot. Awards like the $28 billion verdict for a single smoker in a tobacco case add a level of uncertainty that works against rational settlement behavior and consistent outcomes.[162]

Defenders of the tort system, typically the lawyers who are its most frequent beneficiaries, claim that any inefficiencies are outweighed by the deterrence functions that a fault-based system ensures. Yet as experts readily acknowledge, there is little systematic evidence about how much deterrence such a system adds to regulatory controls, and whether the marginal deterrence is worth its price.[163] Most research suggests that the deterrent effect of tort cases is muted by liability insurance and by the delays, inconsistencies, and inaccuracies of litigation.[164] For example, studies of medical malpractice find that the chance that a physician's negligent error will lead to compensation is under 5 percent.[165] And because doctors' malpractice premiums generally do not reflect their personal records, the economic sanctions imposed by current liability structures are often indirect and ineffectual.[166] Physicians already have strong personal and professional reasons to avoid negligent practices, and it is not clear that an expensive fault-based compensation system adds

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Nov. 17, 2002, at C1 (noting the "finite sums of money available" to compensate asbestos claimants).

161. KAGAN, *supra* note 17, at 138.

162. John M. Broder, *California Jury Allots Damages of $28 Billion to Ill Smoker*, N.Y. TIMES, Oct. 15, 2002, at A14. An appellate court reduced the judgment to $28 million. Myron Levin, *Judge Slashes Huge Award in Smoking Case; Record $28-Billion Verdict by a Los Angeles Jury to a Lung Cancer Sufferer is Trimmed to $28 Million*, L.A. TIMES, Dec. 19, 2002, § 3 at 1.

163. *See* Schwartz, *supra* note 110, at 444 ("[F]or most sectors of tort law the pertinent data bearing on safety benefits and defendant compliance costs are now and are likely to remain unavailable. For this and other reasons, most sectors of tort law cannot be subjected to anything resembling a full cost-benefit review.").

164. *See* KAGAN, *supra* note 17, at 141–44 (surveying research on the uncertain deterrent effect of tort liability).

165. Mello & Brennan, *supra* note 112, at 1618.

166. *See id.* at 1621 ("[M]alpractice insurance premiums are rarely experience rated. Thus, . . . health care providers do not feel the full economic consequences of their mistakes.").

any crucial measure of deterrence.[167] Other research on tort litigation finds that the threat of lawsuits exerts a significant but vague influence on individual and organizational behavior.[168] As experts note, "Because the linkage between good design and a firm's liability exposure remains tenuous, the signal says only: 'Be careful, or you will be sued.' Unfortunately, it does not say *how* to be careful, or, more important, *how careful* to be."[169]

Moreover, the strengths of the American legal structure in compensating for political inaction carry countervailing costs. Many problems that land in courts by default could be addressed more effectively by legislative or regulatory action. Particularly in cases involving major societal interests or mass torts, delegating decisionmaking to the least accountable branch of government raises as many problems as it resolves.[170] The tobacco litigation is a stunning example of the inordinate health and legal costs that have resulted from political paralysis. At last count, trial lawyers were set to pocket more than $75 billion over the next quarter-century; some of these lawyers netted fees amounting to $150,000 per hour.[171] Much of that money could have gone for prevention and treatment if the government had acted earlier.

In short, America's heavy reliance on litigation, particularly in personal injury contexts, comes at a substantial price, although the major problems are not the ones that dominate public debate. American rates of litigation are neither as exceptional nor as great a drain on productivity as critics often suggest. But the system for compensating victims is inefficient, inconsistent, and inequitable. Plaintiffs with serious injuries are undercompensated, similar cases do not receive similar treatment, defendants draw murky or misleading messages about the risks of liability, and the costs of dispute resolution are excessive. These are not new concerns. To understand their persistence, Americans need a more informed picture of the

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167. *See* KAGAN, *supra* note 17, at 141 ("The precautions taken by physicians . . . are motivated primarily by *professional ethics*.").

168. *Id.*

169. George Eads & Peter Reuter, *Designing Safer Products: Corporate Responses to Product Liability Law and Regulation*, 7 J. PROD. LIAB. 263, 290 (1984).

170. *See* Robert J. Samuelson, *Delegating Democracy*, NEWSWEEK, June 12, 2000, at 59, 59 (suggesting that issues such as tobacco regulation and gun control should be resolved through popular debate and legislation rather than through "[g]overnment by litigation").

171. Marcia Coyle, *Bill Targets Class Action Lawyer Fees: Sparked by Ire over Tobacco Money*, NAT'L L.J., May 19, 2003, at 1.

underlying causes of the problems and the complexities of crafting solutions.

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obtained large damages awards with no legal expenses.[174] Similar coalitions are now challenging other industries, such as gun and lead paint manufacturers.[175]

A full evaluation of alternative structures and potential reform strategies is beyond the scope of this essay. But to put the debate over access to justice in perspective, it makes sense at least to suggest better ways of thinking about litigation-related problems and appropriate policy responses. To this end, reform efforts should first focus on core principles. What are the major goals of the justice system, and how should the nation measure its effectiveness in achieving them?

A broad range of scholarly and popular commentary speaks to both of these questions and generates an equally broad range of views. But there is consensus on several main points. The primary objectives of a civil litigation system should be to resolve disputes, compensate victims, and deter violations of legal standards. Key criteria for assessing the performance of the system include its costs in time, money, and acrimony, and its procedural and substantive fairness. The substantive standard is, of course, the most difficult to apply. Part of the problem in developing a reform agenda is the lack of consensus on what constitutes reasonable outcomes, particularly in personal injury cases. But some measure of agreement seems likely on certain core values. One is consistency; similar cases should yield similar results. A second is the opportunity to be heard and to obtain some measure of individualized treatment. These are, to some extent, competing values. Individualized opportunities are costly and increase the likelihood of inconsistent results. But only by explicitly addressing the tradeoffs are we likely to obtain reform strategies that respond to Americans' highest aspirations and most critical concerns.

Common reform proposals take three main forms. One approach is to discourage litigation by making recovery more difficult for both plaintiffs and their attorneys. A second strategy is to focus on better management of legal claims. Examples include greater use of sanctions for frivolous cases and alternative forms of dispute resolution. A final option is to reduce the need for litigation by creating other compensation systems or by minimizing the problems that give rise to legal disputes.[176]

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174. Sherrid, *supra* note 125, at 34.

175. OLSON, *supra* note 39, at 108; Sherrid, *supra* note 125, at 34.

176. *See* BURKE, *supra* note 3, at 27.

The modern tort reform movement has relied primarily on the first approach. Beginning in the 1970s, an alliance of businesses, professional associations, insurance companies, and a few nonprofit and governmental organizations began a major campaign to limit "litigation abuse."[177] A second wave of reform occurred in the mid-1980s and another took place in the late 1990s. A renewed push emerged after the Republican election victories in 2000.[178] Each effort brought modest success, primarily in terms of state legislation[179] and education of judges and juries about the implications of large awards for taxpayers and consumers.[180] The main legislative reforms have involved placing limits on punitive and noneconomic damages such as pain and suffering, creating panels to screen medical malpractice cases, restricting lawyers' contingent fees, limiting venue to prevent parties from shopping for "plaintiff-friendly" jurisdictions, and altering the substantive tort law on matters such as the availability of damages from "collateral" sources or from joint defendants whose codefendants are insolvent. In the most recent campaign, additional objectives have included federal legislation to cap pain and suffering awards and to restrict class actions.[181] Attention also has focused on more fundamental changes, such as loser-pays proposals that would make unsuccessful litigants liable for their opponents' legal fees.[182]

Some of these reforms create as many problems as they solve. As noted earlier, the vast majority of tort victims are undercompensated, not overcompensated. Only a small minority file successful claims and the individuals most seriously injured receive the least adequate recoveries. Limiting damages compounds these injustices. Such limitations strike hardest at those with the most severe disabilities and

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177. *See id.* at 29.

178. *See* text accompanying note 181 *infra*.

179. Rebeca Rodriguez, *Tort Reform Narrowly Approved*, SAN ANTONIO EXPRESS-NEWS, Sept. 14, 2003, at 1A.

180. BURKE, *supra* note 3, at 32.

181. For an overview, see generally Stephanie Francis Ward & Siobhan Morrissey, *Tort Reform Gaining Traction, Coupons*, A.B.A. J. E-REPORT, Nov. 5, 2004, WL 3 No. 44 ABAJEREP 1. *See also* Class Action Fairness Act of 2005, S. 5, 109th Cong. (2005); Leonard Post, *Tort Reform: Fate of 2004 Class Actions with a New Act: A Mixed Bag*, NAT'L L. J. Feb. 21, 2005, at A1; David Rogers & Monica Langley, *Bush Set to Sign Landmark Bill on Class Actions*, WALL ST. J., Feb. 18, 2005, at A1 ("Future civil actions will be subject to a new, more federalized framework that would remove cases from state courts if the aggregate claims are more than $5 million.").

182. RHODE, *supra* note 1, at 129; *see also* CRIER, *supra* note 38, at 211 (arguing that "loser pays all costs would be the biggest single change to improve our civil court system today").

at vulnerable individuals such as low-wage workers, full-time homemakers, or children, whose economic losses are too modest to justify litigation.[183] Similar injustices arise with reforms that would require most punitive damages to be paid to the state, rather than to lawyers and injured parties.[184] Moreover, the impact of such limitations on insurance costs is modest. A Congressional Budget Office study estimated that a national cap of $250,000 would reduce consumers' health insurance premiums by less than 1 percent.[185] According to one medical association estimate, the effect of similar New Jersey legislation would be to lower doctors' premiums by only about 5 to 7 percent.[186] If, as these associations claim, America is truly facing a malpractice crisis, these responses are scarcely adequate.

Requiring unsuccessful litigants to pay their adversaries' legal fees might reduce frivolous claims but at the cost of discouraging meritorious ones as well. The parties most likely to suffer would not be corporations, which can absorb additional legal costs as tax-deductible business expenses. The real losers would be people of moderate means with strong but uncertain claims who could not risk subsidizing both sides of an unsuccessful suit. Supporters of fee-shifting initiatives seldom discuss this problem.[187] Instead, they

183. Damage caps would also deter lawyers from taking cases that do not impair employment, such as that of a woman who had both breasts removed because of an erroneous lab report diagnosis of cancer. *See* Bob Herbert, *Malpractice Myths*, N.Y. TIMES, June 21, 2004, at A23. There is also evidence that lawyers may be unwilling to accept cases with low economic damages under systems that cap non-economic damages. *See id*.; Court, *supra* note 97; Rachel Zimmerman & Joseph Hallinan, *As Malpractice Caps Spread, Lawyers Turn Away Some Cases*, WALL ST. J., Oct. 8, 2004, at A1; Rhonda L. Rundle, *Effect of Malpractice Caps is Tallied*, WALL ST. J., July 13, 2004, at D4.

184. For a proposal by California Governor Arnold Schwarzenegger that would give the state 75 percent of punitive damage recoveries, see Adam Liptak, *Schwarzenegger Sees Money for State in Punitive Damages*, N.Y. TIMES, May 30, 2004, at A12; David Wessel, *California Looks for Cash in the Courtroom*, WALL ST. J., May 20, 2004, at A2. For the disincentives to litigate claims involving punitive damages under such damage-sharing formulas, see Walter Olsen, *More Punitives to the People*, WALL ST. J., June 2, 2004, at A14.

185. Eisler et al., *supra* note 80.

186. *Id*.

187. *See* Robert Kagan, *Do Lawyers Cause Adversarial Legalism?: A Preliminary Inquiry*, 19 LAW & SOC. INQUIRY 1, 11 (1994) (describing Americans' "mistrust [of] concentrated power, care about individual rights, and [belief] in private ordering" as leading to the development of legal rules, such as the rejection of a loser-pays dynamic, that encourage access to courts); *see also* Attorney Accountability Act, H.R. 988, 104th Cong. (1995); Common Sense Legal Reforms Act, H.R. 10, 104th Cong. (1995); Glaberson, *supra* note 83; Glaberson *supra* note 121.

emphasize that loser-pays systems are the norm in other nations.[188] But these countries typically have more comprehensive legal assistance, social welfare, and health insurance programs than does the United States. Such programs reduce reliance on privately financed litigation to subsidize the costs of injuries, which also reduces the chilling effects of fee liability. American advocates of fee-shifting policies are also diplomatically silent about Florida's unsuccessful experience. After five years, the state abolished its loser-pays system in medical malpractice cases. Although the threat of additional legal fees did somewhat reduce the number of malpractice cases filed, it also increased the number that went to trial. Plaintiffs fought harder because the stakes were higher. And because a significant number of losing plaintiffs had insufficient assets to pay opponents' costs, defendants' overall expenses were also higher.[189] Whether comparable results could be avoided under more carefully designed systems is a complex question on which experts disagree. But supporters of fee shifting have made little effort to educate policymakers or the public about the complicated and uncertain tradeoffs that their proposal would entail.[190]

The second type of reform proposals, which attempts to improve management of legal disputes, holds more promise but often suffers from the same limitations as discussions of litigiousness. The public gets too much sweeping rhetoric and too little careful factual analysis. Critics of the current system frequently present alternative dispute resolution (ADR) as an all-purpose prescription. It becomes *the* preferred solution for excessive expense, delay, and combativeness. Critics of ADR offer similarly sweeping assessments. In their analysis,

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188. Werner Pfenningstorf & Donald G. Gifford, *Introduction* to A COMPARATIVE STUDY OF LIABILITY LAW AND COMPENSATION SCHEMES IN TEN COUNTRIES AND THE UNITED STATES (Donald G. Gifford & William M. Richman eds. 1991).

189. *See* James W. Hughes & Edward A. Snyder, *Litigation and Settlement under the English and American Rules: Theory and Evidence*, 38 J. L. & ECON. 225, 248 (1995) (noting evidence from Florida suggesting adverse effects on procedural efficiency and deterrence under the loser-pays rule); Edward A. Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J. LAW, ECON. & ORG. 345, 576–78 (1990) (summarizing evidence from Florida finding a greater likelihood of trials under loser-pay rules); *infra* note 190.

190. *Attorney Accountability: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Congress 49–66 (1995) (statement of Professor Herbert M. Kritzer); *id.* at 42–47 (statement of Professor Thomas D. Rowe, Jr.).

ADR offers "apartheid justice"—a strategy for bypassing, rather than addressing, inadequacies in the current structure.[191]

To make sense of this debate, the public needs fewer categorical pronouncements and more contextual evaluation. The last two decades have witnessed a dramatic growth in the range and sophistication of ADR methods, such as arbitration, mediation, and adjudication by privately retained judges. Some recent tort reform proposals would build on this experience by creating specialized tribunals to hear malpractice or product liability cases. Current ADR methods vary considerably in structure and offer different strengths and limitations. Not all respond effectively to concerns about litigiousness. Public debate too often relies on over- simplified or idealized models. ADR advocates tend to compare a courtroom trial, with all its costs, to a more informal, participatory process, with all its virtues. From this perspective, adversarial proceedings look far less attractive than alternatives that can assist parties to identify underlying interests, explore possibilities for mutual gains, and discover strategies that may prevent or resolve future disputes.[192]

Yet as ADR critics note, 85 to 95 percent of civil cases never get to trial[193] and many ADR processes are no less costly or contentious than traditional adjudication.[194] For example, proceedings before privately selected arbiters, judges, or jury panels rely on conventional adversarial frameworks. Opportunities for delay and obfuscation are comparable to those plaguing current litigation processes.[195] Imbalances of wealth, power, and information may skew outcomes

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191. NADER & SMITH, *supra* note 54, at 299–300; Robert Gnaizda, *Secret Justice for the Privileged Few*, 66 JUDICATURE 6, 11 (1982); *see* Owen Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) ("Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done.").

192. *See generally* Deborah R. Hensler, *In Search of "Good" Mediation: Rhetoric, Practice and Empiricism*, *in* HANDBOOK OF JUSTICE RESEARCH IN LAW 231 (Joseph Sanders & V. Lee Hamilton eds., 2000) (exploring the "effects of implementing different mediation paradigms for resolving civil legal disputes.").

193. Marc Galanter & Mia Cahill, "*Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339–40 (1994).

194. *See* Richard C. Reuben, *The Lawyer Turns Peacemaker*, A.B.A. J., Aug. 1996, at 54, 58 (describing costs in time, money, and contentiousness).

195. E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 177 (1988); Reuben, *supra* note 194, at 58; *see* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 553 (1986) (noting that some "problems associated with judge-sponsored settlements arise within the ADR context as well").

under any dispute resolution system, including ones that rely on nonadversarial approaches.[196] Research comparing mediation and adjudication does not find consistent differences in costs, speed, or participant satisfaction.[197]

Rather, this research underscores the importance of context both in structuring and evaluating dispute resolution processes. Problems are most likely to surface in arbitration, mediation, and screening processes that are mandatory rather than voluntary, or that fail to address major disparities in power and resources. For example, compulsory workplace arbitration systems that involve employers who are repeat players often systematically disadvantage employees who are not.[198] In one study involving such systems, the odds of an employer victory were about 5 to 1.[199] Only repeat players had incentives to investigate the records of ostensibly "neutral" decisionmakers to identify possible biases.[200] Even when parties are more evenly matched, ADR is not always a desirable substitute for adjudication. Processes designed to satisfy private parties lack public accountability and may undervalue public interests.[201] ADR methods do not require appointed or elected officials to enforce norms that are subject to democratic or judicial oversight.[202] Informal procedures aimed at private settlements may provide insufficient development of legal precedents or inadequate deterrence of unlawful conduct.[203]

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196. *See* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1391 ("ADR is no safe haven for the poor and powerless.").

197. *See* JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT: A SUMMARY 4–7 (1996). For mixed results, see the studies cited in Reuben, *supra* note 194, at 56–59, and Deborah R. Hensler, *Puzzling Over ADR: Drawing Meaning from the RAND Report*, DISP. RESOL. MAG., Summer 1997, at 8, 9.

198. Reuben, *supra* note 194, at 61.

199. *Id*.

200. *Id*.

201. *See* Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 346 (1996) ("Although privatized ADR has the advantage of removing certain disputes or even whole classes of disputes from the admittedly crowded judicial system, it holds substantial potential for unfairness at least so long as judicial review of private arbitration remains highly deferential." (footnote omitted)).

202. *See* Fiss, *supra* note 191, at 1085 (arguing that the judiciary cannot give force to the public values reflected in statutes and constitutions when disputes are resolved without trial).

203. LIND & TYLER, *supra* note 195, at 122; Fiss, *supra* note 191, at 1085; David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622–23 (1995).

Yet the issue in evaluating legal processes should always be, "Compared to what?" Critics who denounce ADR as second-class justice need to consider how often first-class is available, and on what terms. The deficiencies common in ADR are also chronic in conventional adjudication. Private settlements are the norm, not the exception, and procedural protections that are available in theory are often unavailable in practice. Imbalances of wealth, power, and information skew outcomes even in cases receiving the closest judicial oversight. As the title of Professor Marc Galanter's now-classic article put it, the "'Haves' Come Out Ahead" in most legal settings.[204]

If any single lesson emerges from the burgeoning research on dispute resolution, it is that no single method is uniformly superior. Yet the current legal process is heavily weighted in favor of a single adversarial structure, which does not always serve the interests of either participants or the public. What the nation needs instead is a broader range of procedural choices and the information necessary to make them; more innovation and evaluation should be priorities. Proposals along these lines are not in short supply. Many ADR experts have developed promising blueprints for "multidoor courthouses" that would "fit the forum to the fuss."[205] These courthouses would allocate different types of cases to appropriate dispute resolution processes based on several basic criteria: the nature of the controversy, the novelty or complexity of the relevant law, the relationship between the parties, the priorities that the participants attach to various features of the dispute resolution process, and the societal interests at issue.[206] Cases involving relatively small monetary damages and the application of settled legal precedents may not justify the expense of full-scale adjudication. In other contexts, the relationship between the parties may argue for procedures that are best able to address power disparities or to foster long-term working relationships. Specialized tribunals may be appropriate when subject-matter expertise and experience are critical to ensuring reasonable

204. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 95 (1974).

205. Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOTIATION J. 49, 67 (1994); *see* Frank E.A. Sander, *Varieties of Dispute Processing*, Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976), *in* 70 F.R.D. 111, 118–26 (1976) (outlining several criteria for dispute resolution).

206. Sander, *supra* note 205.

and consistent treatment of similar cases.[207] Development of special substantive rules, such as an adequate standardized formula for pain and suffering damages, could assist such tribunals in reaching more uniform awards that would not penalize low-income victims.[208]

A related, but more fundamental, reform strategy would be to replace the litigation/ADR structure with a more streamlined no-fault compensation system. Many other countries have successfully implemented such systems in areas such as personal injury, discrimination, and administrative benefits.[209] These processes often make lawyers unnecessary and provide effective remedies with minimal transaction costs. The United States has adopted similar systems in a few contexts, such as workplace accidents and the September 11 terrorist attacks.[210] Some private institutions have also attempted to preempt litigation by creating their own no-fault reimbursement funds. For example, a small but growing number of hospitals and insurance companies have an "honesty policy" under which they inform patients of mistakes and provide compensation for lost wages and medical expenses.[211] Experience to date suggests that these policies are highly cost-effective.[212] Many experts have advocated analogous specialized tribunals and streamlined no-fault compensation structures for "adverse medical events."[213] Such systems could offer a number of advantages over malpractice litigation: more

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207. *See* KAGAN, *supra* note 17, at 135–38 (describing the Japanese treatment of automobile tort cases: a predictable system of prompt official investigation, clear damages formulas, and legal standards fixed by statute); *id.* at 238 (describing Wisconsin's heightened administrative control over workers' compensation cases).

208. *See id.* at 137–39, 238, 275.

209. *See id.* at 137–39.

210. BURKE, *supra* note 3, at 39.

211. Julie Appleby, *Insurer, Hospitals Try Apologies for Errors*, USA TODAY, Mar. 5, 2003, at B5; Eisler et al., *supra* note 80; Rachel Zimmerman, *Doctors' New Tool To Fight Lawsuits: Saying "I'm Sorry,"* WALL ST. J., May 18, 2004, at A1.

212. *See* Appleby, *supra* note 211; Zimmerman, *supra* note 211.

213. *See* Mello & Brennan, *supra* note 112, at 1626–28 ("We advocate a shift to a system emphasizing greater enterprise liability . . . [including] a limited no-fault compensation scheme . . . such that claims that [fall] within a predefined class of avoidable adverse events would be automatically paid by the insurer without a formal finding of negligence."). For discussion of specialized medical malpractice courts with expert judges that would screen claims or award compensation, see John Gibeaut, *The Med-Mal Divide*, A.B.A. J., Mar. 2005, at 39, 40–42 (2005); Lindsay Furtado, *States Weigh Med-Mal Courts*, NAT'L L. J., Dec 13, 2004, at A5; Philip K. Howard, *Yes, It's a Mess—But Here's How to Fix It*, TIME, June 9, 2003, at 62, 62; Betsy McCaughey, *Medical Courts Would Heal Infirmities of Legal System*, INVESTOR'S BUS. DAILY, July 17, 2003, at A15.

timely remedies, coverage for a broader group of victims, and lower transaction costs.

Whether no-fault frameworks would provide adequate deterrence of negligent conduct in other personal injury contexts has provoked considerable debate. Much would depend on the details of the systems and surrounding legal culture. However, in the case of medical malpractice, some evidence suggests that no-fault frameworks could result in more frequent reporting of errors and give providers greater incentives to reduce all preventable injuries, not just the injuries demonstrably linked to negligence.[214] For a health care system that now causes somewhere between forty-four thousand and ninety-eight thousand avoidable patient deaths annually, this would be a significant benefit.[215]

A rational reform agenda would provide more experimentation with no-fault frameworks, specialized tribunals, and other ADR approaches, as well as more systematic information about their effectiveness. How well do different models serve societal goals concerning efficiency, deterrence, fairness, cost, and accessibility? Granting the risks of superficial cross-cultural comparisons, what can reformers learn from other countries' approaches to similar legal problems? Although more adequate data are necessary, the research available suggests that expanding procedural options is a move in the right direction.[216] Parties' satisfaction with the legal process is heavily dependent on assessments of its procedural fairness; opportunities for direct participation, not mediated through lawyers, can increase perceptions of fairness.[217] Most individuals prefer to handle legal grievances in informal, out-of-court settings and to have more control over the process than is possible in litigation.[218] Expanding ADR also

214. Mello & Brennan, *supra* note 112, at 1629–30; ROBERT M. WACHTER & KAVH G. SHOJANIA, INTERNAL BLEEDING: THE TRUTH BEHIND AMERICA'S TERRIFYING EPIDEMIC OF MEDICAL MISTAKES 342–46 (2004) (discussing the advantages of a no-fault framework).

215. *See* Eisler et al., *supra* note 80 (citing a 1999 study by the Institute of Medicine estimating numbers of patient deaths).

216. *See generally* Sanders, *supra* note 152.

217. *See* LIND & TYLER, *supra* note 195, at 102–04 (citing studies finding that the opportunity to present one's views and arguments improves perceptions of justice).

218. *See* HAZEL G. GENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW 254–55 (1999) ("In finding pathways to solutions, members of the public want routes that are quick, cheap, and relatively stress-free."); Stempel, *supra* note 201, at 353–54 (suggesting that "an institutionalized ADR system with a mediation-arbitration-litigation continuum" not only facilitates "voluntary resolution, but also provides sufficient decisionmaking procedure and authority to satisfy many litigants").

introduces a measure of beneficial competition. If individuals have choices, they have greater leverage in making their needs heard and in enhancing the quality of the options available.

A final cluster of reform strategies should focus on the misconduct that breeds excessive litigation and related abuses. For example, more effective disciplinary processes for doctors and lawyers could help address the roots of the problem. Some research suggests that, over the last decade, 5 percent of physicians have been responsible for one-third of malpractice awards and settlements. It does not, of course, follow that these doctors are responsible for a similarly disproportionate share of the vast number of medical errors that never result in claims. Nor are many of these errors the products of individual negligence. But a system that more effectively weeded out practitioners with a history of incompetence would produce substantial savings in lives and dollars. Further progress could come from building more incentives for quality control into malpractice insurance rates and health care regulation. Avoidable errors could be reduced through improvements in prevention and oversight structures.[219]

Courts, bar associations, and legislatures could also do more to curb excessive legal fees and frivolous cases. Closer judicial scrutiny and more stringent contingent fee standards could help limit lawyers' charges to a reasonable return for work performed and risk assumed.[220] Greater efforts should focus on preventing suits with little merit from remaining financially advantageous for counsel. Courts could, for example, require that percentage fees in class actions be based on the damages that class members actually receive, rather than on the theoretical value of unredeemed coupons.[221] Another strategy, reflected in some state statutes and proposed legislation, would be to provide more limits on the percentage formula that lawyers can charge, based primarily on how far the case progresses and how time-consuming preparation becomes. Under such a system, in a matter settled without filing suit, lawyers could collect only 25 percent of the recovery. In a case settled after filing, their share could not exceed

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219. *See* Mello & Brennan, *supra* note 112, at 1628 (advocating an "engineering approach to error prevention," in which technology is used to help prevent avoidable mistakes).

220. RHODE, *supra* note 1, at 178.

221. *See* Peter Blumberg, *Keeping a Secret*, S.F. DAILY J., Sept. 13, 2003, at A1; Coyle, *supra* note 171; Martha Neil, *Texas Clips Coupons*, A.B.A. J. E-REPORT, Nov. 22, 2002, WL 1 No. 45 ABAJEREP 1 (discussing a Texas law requiring that lawyers in coupon-payout class actions be paid in coupons as well).

one-third, and in a case that went to trial, lawyers could collect 40 percent.[222] Reasonable fee ceilings or taxes on excessive fees could be appropriate in contexts involving huge windfall recoveries, such as the tobacco litigation.[223] Disciplinary agencies could also impose significant sanctions on attorneys who repeatedly filed meritless suits or charged extortionate fees. In California's first such effort, the bar sought suspension of three attorneys who held small businesses hostage for payoff settlements in unfair competition cases.[224] It should not, however, have taken some three thousand claims, with boiler plate pleadings and no investigation of the underlying facts, to trigger disciplinary action.[225]

CONCLUSION

The greatest difficulty in developing an effective litigation reform agenda is political, not conceptual. Innovative ideas and promising models are readily available. But what the country does lack is an informed public committed to addressing the justice system's most fundamental problems and the forces that perpetuate them. Policy debates have been hijacked by skewed information and special interests. Lawyers seeking maximum fees, businesses seeking maximum profits, and physicians seeking minimum liability have invested vast efforts in pushing their own agendas. Few of the reform proposals that seem remotely plausible are likely to produce the result that most Americans want: a dispute resolution system that is efficient, equitable, and affordable. Significant progress is unlikely until more disinterested players enter the arena and give the public a better understanding of the most serious problems and plausible

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222. LESTER BRICKMAN ET AL., *supra* note 148; Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM. L. REV. 247, 305–08 (1996).

223. For such proposals, see Susan Beck, *Giveback Time*, AM. LAW., Aug. 2003, at 15 (discussing an attempt by Republicans in Congress to legislate repossession of much of the legal fees awarded from the tobacco settlement). *See also* Coyle, *supra* note 171; 20 ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT 285 (2004) (discussing the United States Senate's rejection of a proposed legislation that would impose a 200 percent excise tax on tobacco lawyers' fees that exceeded $20,000 per hour). For the kind of windfalls justifying such an approach, see Beam, *supra* note 146.

224. Monte Morin, *Three Lawyers Suspended over Flood of Suits*, L.A. TIMES, May 22, 2003, at B1. *But see* Michael Hytha, "*People's Lawyer" Gets Mild Penalty from State Bar*, S.F. CHRON., Aug. 8, l997, at A19 (noting the instance of one lawyer who charged 46 percent contingency fees in small claims cases and collected fees for arranging insurance payments, but who merely received a private reproof from the state bar).

225. Morin, *supra* note 224.

prescriptions. H.L. Mencken was right that "what ails the truth is that it is mainly uncomfortable and often dull."[226] The litigiousness debate is no exception. Frivolous cases make entertaining reading but a misleading blueprint for reform.

226. RHODE, *supra* note 1, at 130.